Federal Court of Appeal  Cour d'appel fédérale

Date: 20150724

Docket: A-68-14

Citation: 2015 FCA 168

CORAM: **DAWSON J.A.**
STRATAS J.A.
SCOTT J.A.

BETWEEN:

CANADIAN ARAB FEDERATION (CAF)

Appellant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Heard at Toronto, Ontario, on March 3, 2015.

Judgment delivered at Ottawa, Ontario, on July 24, 2015.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: STRATAS J.A.
SCOTT J.A.

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REASONS FOR JUDGMENT

DAWSON J.A.

[1] For a number of years, the Canadian Arab Federation (Federation) provided language instruction to newcomers to Canada through the federal government's Language Instruction for Newcomers to Canada (LINC) program. The contribution agreement that governed the relationship between the Federation and the Department of Citizenship and Immigration Canada (CIC) from 2007 to 2009 expired on March 31, 2009. While the Federation and CIC entered into

negotiations for the subsequent funding cycle, the then Minister of Citizenship and Immigration, the Honourable Jason Kenney, decided that CIC would not enter into a further contribution agreement with the Federation. The letter advising the Federation of this decision explained that:

> […] serious concerns have arisen with respect to certain public statements that have been made by yourself or other officials of the CAF. These statements have included the promotion of hatred, anti-semitism and support for the banned terrorist organizations Hamas and Hezbollah.
>
> The objectionable nature of these public statements — in that they appear to reflect the CAF's evident support for terrorist organizations and positions on its part which are arguably anti-Semitic — raises serious questions about the integrity of your organization and has undermined the Government's confidence in the CAF as an appropriate partner for the delivery of settlement services to newcomers. As a result, CIC will not be entering into a further funding agreement with the CAF upon the expiry of the above-noted agreement.

[2] For reasons cited as 2013 FC 1283, the Federal Court dismissed an application for judicial review of the Minister's decision. This is an appeal from the judgment of the Federal Court.

[3] On this appeal, the Federation asserts that the Federal Court erred in law by finding that:

i) The Federation was not owed a duty of procedural fairness by the Minister when he decided that his department would not enter into a further contribution agreement with the Federation;

ii) The Federation's freedom of expression was not infringed by the decision not to enter into a further contribution agreement with it; and

iii) The Minister's decision was reasonable.

[4] For the reasons that follow, I find that the Federation was not owed a duty of procedural fairness by the Minister, that its freedom of expression was not infringed and that the Minister's decision was reasonable. It follows that I would dismiss this appeal with costs.

I. Was the Federation owed a duty of procedural fairness by the Minister?

[5] The threshold issue of whether the Minister owed the Federation a duty of procedural fairness when he decided that his department would not enter into a new contribution agreement with it is a question of law, reviewable on the standard of correctness.

[6] The primary basis for the Federal Court's conclusion that no duty of fairness arose was that the nature of the relationship between the Federation and CIC was strictly commercial. Neither a statutory nor a contractual provision imposed any procedural fairness obligations on the Minister; accordingly, no duty of fairness arose (reasons at paragraph 38). In the alternative, the Federal Court found that the Federation did not have a right, privilege or interest that was affected by the decision sufficient to impose a duty of fairness on the Minister (reasons at paragraph 54).

[7] During oral argument, counsel for the Minister candidly acknowledged that the Federal Court's primary ground for finding no duty of fairness to exist is problematic. This is because the Court's analysis placed the relationship between the Federation and CIC completely in the realm of private law when, as a matter of law, the relationship contained a mix of public and private law elements.

[8] As further acknowledged by counsel for the Minister, the required analysis in this case is that articulated in cases such as *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643 and *Martineau v. Matsqui Institution*, [1980] 1 S.C.R. 602. In *Cardinal*, at page 653 of the reasons, the Supreme Court affirmed, as a general common law principle, that a duty of procedural fairness lies on every public authority making an administrative decision when the decision affects the rights, privileges or interests of an individual.

[9] The Federal Court relied upon the following factors to find that the Federation did not possess sufficient rights, privileges or interests to engage an obligation of fairness:

i) The Federation had no right to receive LINC funding (reasons paragraph 56);

ii) Any added legitimacy the Federation received as a result of its contractual relationship with CIC was not a sufficient interest to attract procedural fairness obligations. Otherwise, any party that contracts with the government would by virtue thereof acquire procedural rights (reasons paragraph 57); and

iii) The sharing of infrastructure costs with the Federation's other operations was insufficient to trigger a duty of fairness. Funding for the LINC program was provided on a cost-recovery basis for recoverable costs related to the LINC program (reasons paragraph 58).

[10] On this appeal, the Federation does not seriously challenge these findings. Indeed, it concedes that the contribution agreement conferred no commercial benefit upon it. Rather, the Federation argues that the decision amounted to a condemnation of it – the Federation was effectively labelled a supporter of terrorism and anti-Semitic. Reputational harm is of particular

significance for a non-profit community organization; therefore, the Federation asserts that this is a sufficient interest to attract the duty of procedural fairness.

[11] I disagree for the following reasons.

[12] First, the Federation is unable to point to any authority that has found a reputational interest to be sufficient to trigger duties of procedural fairness. While counsel referred to the obligation of a public inquiry to give notice and an opportunity to be heard before making a report against an individual, the source of this obligation is statutory: section 13 of the *Inquiries Act*, R.S.C. 1985, c. I-11. As this duty does not flow from the common law, this example does not assist the Federation.

[13] Second, when courts have found a common law duty of procedural fairness to apply, the rights, privileges or interests that were implicated were qualitatively more substantial than the reputational interest here asserted (for examples, see Donald J.M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada*, looseleaf (Toronto: Carswell, 2014) at 7-53 to 7-55).

[14] Finally, I agree with the Federal Court that if the Federation were afforded procedural rights in this context, every failed applicant for a contribution agreement would be entitled at least to notification that their proposal was not going to be accepted and an opportunity to address the Minister's concerns. This would significantly constrain the Minister's ability to make broad, policy-based decisions on an expeditious basis. As the Federal Court wrote at

paragraph 58 of its reasons "[a]ny incidental interest [the Federation] may have had was heavily outweighed by the public's interest in a Minister with the discretion to make decisions swiftly, instead of one who is paralyzed by procedure".

II. Was the Federation's freedom of expression infringed by the decision?

[15] In the Federal Court the Minister acknowledged, and the Court found, that the Federation's advocacy activities are protected expression. In the view of the Federal Court, the governing authority is the decision of the Supreme Court in *Baier v. Alberta*, 2007 SCC 31, [2007] 2 S.C.R. 673. Applying *Baier*, the Federal Court characterized the Federation's claim to be a claim for positive rights because it sought a positive entitlement to funds for its LINC program and, by extension, its expression (reasons paragraph 84). The Federal Court went on to find there was not a positive entitlement to funding because the right to administer the LINC program is not grounded in a fundamental freedom. As well, there was no substantial interference with the Federation's advocacy efforts because it continues to express its views concerning the Israel-Palestine conflict (reasons paragraph 93). It followed that there was no breach of section 2(*b*) of the Charter.

[16] On this appeal, the Federation argues that once the Federal Court found its advocacy activities to be protected expression, the relevant inquiry was whether the government's action in purpose or intent unduly interfered with the Federation's expressive activity. The Federation relies upon the American doctrine of "unconstitutional conditions" to argue that, even where a person has no "right" to a valuable government benefit, there are some reasons upon which the government cannot rely when denying a benefit. A government cannot deny a benefit to a person

on a basis that infringes the person's constitutionally protected interests, especially the person's freedom of speech (see, for example, *Perry v. Sinderman*, 408 U.S. 593 (1972)).

[17] In my view, recourse to American jurisprudence is not necessary.

[18] For the purpose of my analysis I am prepared to assume, without deciding, that the Federation's advocacy activities are expressive activity and so section 2(*b*) of the Charter is engaged.

[19] The Supreme Court has held that administrative decision-makers must act consistently with the values underlying the grant of discretion to them. These values include Charter values (*Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395). In assessing whether a decision violates the Charter, a court asks whether a decision-maker disproportionately, and therefore unreasonably, limited a right protected by the Charter.

[20] In order to apply Charter values in the exercise of discretion, the decision-maker must first consider the legislative objectives that are at play and the nature of the decision. Then, the decision-maker is to ask how the Charter values will be best protected in view of the legislated objectives. The decision-maker is to balance the severity of the interference with the protected right against the statutory objectives. The proportionality test is satisfied if the measure selected falls within a range of reasonable alternatives.

[21] On judicial review, the question is whether "in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play" (*Doré* at paragraph 57). The standard of review to be applied is reasonableness (*Doré* at paragraph 45).

[22] Applying these principles to the present case, the Charter value at issue is expression.

[23] As for the statutory objectives and the nature of the decision, the objectives of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 with respect to immigration include promoting the successful integration of permanent residents into Canada (paragraph 3(1)(*e*)). The Minister is responsible for the administration of the Act (subsection 4(1)). The Minister is also responsible for implementing the *Canadian Multiculturalism Act*, R.S.C. 1985, c. 24 (4th Supp.). Paragraph 3(1)(*c*) of that Act declares it to be the policy of the Government of Canada to promote the full and equitable participation of individuals and communities of all origins in the evolution of all aspects of Canadian society and to assist them in the elimination of any barrier to that participation.

[24] Sections 3 and 4 of the *Immigration and Refugee Protection Act* and the Treasury Board Policy on Transfer Payments confer a broad discretion on the Minister without prescribing criteria to guide his decision whether to enter into contribution agreements. Neither requires the Minister to enter into a new contribution agreement with an entity after the expiry of an existing, contribution agreement. Further, LINC serves a dual purpose: it provides language training but it also facilitates the social, economic and civic integration of newcomers into Canadian society.

This latter purpose requires that lessons be taught in an environment that demonstrates that tolerance and mutual respect are core aspirational values of Canadian society.

[25] When considering the severity of the interference with the Federation's expressive activity, it is relevant that the funding provided by the contribution agreement was intended for eligible costs actually incurred in carrying out to the LINC program. As the Federation acknowledges, the contribution agreement conferred no commercial benefit upon it. Further, the Federal Court found that there was no substantial interference with the Federation's advocacy efforts because it continued to express its views surrounding the Israel-Palestine conflict, notwithstanding it was not approved for entry into a new contribution agreement.

[26] In my view, whether the allegations made against the Federation that it appeared to promote hatred and anti-Semitism, and to support the banned terrorist groups Hamas and Hezbollah were true or not, the Minister was reasonably entitled to be concerned that its association with LINC could be perceived by the public to be such that the integrity of, and public confidence in, the LINC program would be jeopardized.

[27] In this context, I find the decision not to enter into a new contribution agreement with the Federation was a proportionate response that addressed the Minister's concern while balancing the Charter value of expression.

III. Was the Minister's decision reasonable?

[28] The Federal Court determined the proper standard of review of the Minister's decision to be reasonableness and went on to find the Minister's decision fell within the range of reasonable outcomes.

[29] On appeal from this aspect of the decision, this Court is required to consider whether the Federal Court selected the proper standard of review and applied it appropriately (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at paragraph 45).

[30] On this appeal, the parties agree that the Federal Court selected the proper standard of review. I agree as well. The Federation argues, however, that the decision was not reasonable because:

- The decision was arbitrary and an abuse of authority.
- The decision was required to be constrained by the purpose and object of the legislation.
- "Cutting funding" for a language training program run by the Federation is unrelated to legitimate state concern about preventing violence and protecting Canada's security.
- The "funding cuts" were a blatant attempt to suppress criticism of Israel.
- The Federation is not anti-Semitic.

[31] Before addressing the Federation's arguments, it is important to consider the context in which the Minister's decision was made. This is so because the Supreme Court has emphasized

that, while reasonableness is a single standard, it "takes its colour from the context" (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at paragraph 59).

[32] As Justices Rothstein and Moldaver explained in *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 S.C.R. 458 at paragraph 74 (in dissent but not on this point), the "factual and legal context in which a decision is made is critical to assessing its reasonableness for the simple reason that '[r]easonableness is not a quality that exists in isolation' [citation omitted]". Therefore, the context "shapes" the range of reasonable outcomes.

[33] In the present case, the context is shaped by the nature of the decision: the Minister decided whether his department would use the Federation or another service provider to deliver, in the future, the LINC program. The decision was discretionary; there were no enumerated factors the Minister was required to consider. It was a decision based upon the Minister's policy view that the federal government should not fund certain organizations. As the Minister's Communications Director swore in his affidavit:

> [W]hile private citizens and organisations are free to express their opinions, no individual or organisation is entitled to a financial subsidy from taxpayers. To that end, groups that promote hatred, including anti-Semitism, or excuse terrorism and violence should not receive any official recognition or subsidy from the state.

[34] This type of decision is one which courts afford a wide margin of appreciation to the decision-maker. As Lord Neuberger (concurring in the result) wrote in *R (on the application of Rotherham Metropolitan Borough Council and others) v. Secretary of State for Business, Innovation and Skills*, [2015] UKSC 6, at paragraph 78 — an appeal from an application for

judicial review concerning government funding decisions — policy based decisions of this type are "particularly difficult for a court to evaluate and therefore to criticise, and therefore to condemn."

[35] At the same time, as the majority observed in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R 190, at paragraph 27, judicial review is "intimately connected with the preservation of the rule of law". Judicial review addresses the underlying tension between the rule of law and, in this case, the exercise of a discretion conferred by federal legislation. Courts must uphold the rule of law, while not unduly interfering with functions delegated by Parliament. It follows that while decisions of this type are given a wide margin of appreciation, they are not immune from review.

[36] Having reviewed the context, I now turn to the reasonableness of the Minister's decision. The Federal Court's reasonableness analysis is found at paragraphs 101 to 108 of the Court's reasons. I see no error in the Court's analysis.

[37] I deal as follows with the Federation's arguments on appeal.

[38] First, a decision authorized by statute is unreasonable if it is made for arbitrary reasons or for reasons unrelated to the objects of the statute (*Roncarelli v. Duplessis*, [1959] S.C.R. 121, at pages 140-143 and 156). While the Federation asserts that the decision was contrary to the purpose and object of the legislation, it does not demonstrate how this is so.

[39] The Treasury Board Policy on Transfer Payments underscores that payments of the type made under the contribution agreement are "key instruments in furthering [the government's] broad policy objectives and priorities".

[40] More importantly, the appropriateness of a service provider must be an inherent component of the LINC selection process. This is particularly the case when, as the Federation acknowledges, the program is to orient newcomers to the Canadian way of life. This is evidenced in the LINC Curriculum Guidelines. "Topic Development Ideas" include teaching more about:

- the advantages of diversity;
- the connection between multiculturalism and the Canadian identity;
- respect for cultural distinctiveness; and
- ways to combat racism and intolerance.

[41] The decision not to select the Federation as a service provider because public statements made by its representatives appear to support terrorism and positions which are arguably anti-Semitic cannot be said to be contrary to the purpose and object of the relevant legislation.

[42] Further, the Federation's reliance upon *Roncarelli* is misplaced. There, the decision-maker revoked a generally available privilege on a basis unconnected with the legislation. In this case, as the Federal Court found, the Minister acted within his mandate to further the education of, and the inculcation of Canadian values in, newcomers to Canada.

[43] Next, the Federation asserts that its funding was "cut" for improper purposes. However, no error has been shown in the finding of the Federal Court that the Minister decided not to

distribute finite resources to fund the Federation because it was not an appropriate service provider.

[44] Finally, as the Minister argues, there are mixed views about what constitutes anti-Semitism and whether the Federation's conduct could be perceived to be anti-Semitic. The Federal Court found the record was "replete" with articles and statements that supported the Minister's characterization of the Federation (reasons paragraph 107). This clash of views demonstrates the Minister's decision was within the margin of appreciation of reasonable outcomes, defensible in light of the law and the facts.

IV. Conclusion

[45] For these reasons, I would dismiss the appeal with costs.

"Eleanor R. Dawson"

J.A.

"I agree.
David Stratas J.A."

"I agree.
A.F. Scott J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

Barbara Jackman Paul Champ Hadayt Nazami	FOR THE APPELLANT
Mary Matthews Nur Muhammad-Ally	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Jackman Nazami & Associates Toronto, Ontario	FOR THE APPELLANT
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT